(12)

No. 92-2058

IN THE

Supreme Court of the United States

October Term, 1993

HAWAIIAN AIRLINES, INC.,

Petitioner,

v.

GRANT T. NORRIS,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Hawaii

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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I. INTEREST OF THE AMICI CURIAE

The National Employment Lawyers Association (NELA) is a nationwide bar association of more than 1800 lawyers who regularly represent

individual employees. Founded in 1985, with headquarters in San Francisco, NELA has filed several amicus briefs in this Court as well as in Circuit Courts of Appeal and various State Supreme Courts.

Because of its practical experience with employment issues, NELA is an appropriate entity to brief this Court on the importance of the issues and the practical effects of the Court's decision on the hundreds of thousands of transportation employees under the purview of the Railway Labor Act.

II. SUMMARY OF THE ARGUMENT

Prior decisions of this Court support the holding of the Supreme Court of Hawaii that the Railway Labor Act does not preempt disputes independent of a labor agreement. Public policy

also supports that holding.

Because the mandatory arbitration provision of the Railway Labor Act covers only disputes which arise out of a collective bargaining agreement, the provision does not preempt disputes, such as those relating to state labor laws or federal anti-discrimination statutes, which are independent of the labor agreement and do not require interpretation of it.

Extended to its logical conclusion, the position taken by the Petitioner in this case would ultimately result in the ability of all unionized employers, particularly those in the transportation industry, to exempt themselves from state labor laws and federal anti-discrimination laws. Private employers could effectively enfeeble both state and federal

labor and anti-discrimination laws by requiring arbitration to prevent an employee from asserting in state or federal court the rights that such employees enjoy wholly independent of the collective bargaining relationship.

III. ARGUMENT

The Supreme Court of Hawaii correctly held that this case does not involve a minor dispute subject to mandatory arbitration under the Railway Labor Act [RLA], 45 U.S.C. §§153(i). To hold otherwise would deprive employees of protection and rights accorded under both federal and state statutes independent of collective bargaining agreements; these rights include protection against whistleblowing, as in the instant case, and protection from discrimination based on race, gender, religion,

national origin, age, disability and the attainment of benefits under pension and health benefit plans.[1]

A. Disputes Not Conclusively Resolved By Interpretation of The Collective Bargaining Agreement Are Not Appropriate For Mandatory Arbitration Under The Railway Labor Act

Whether a claim must be submitted to arbitration under the RLA turns on whether the dispute is major or minor. Petitioner contends that the issue in the instant case involves a minor dispute subject to the mandatory arbitration provisions of the RLA. The terms "major dispute" and "minor dispute" do not

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[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq.; Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq.; Americans with Disabilities Act, 42 U.S.C. §§12101 et seq.; Employment Income Retirement Security Act, 29 U.S.C. §1140.

appear in the RLA. This Court has used the terms to describe two classifications of labor disputes. "[M]ajor disputes seek to create contractual rights, minor disputes to enforce them." Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299, 302 (1989).

Minor disputes may be "conclusively resolved" by interpreting the collective bargaining agreement. Consolidated Rail Corp. 491 U.S. at 305. Thus the whole panoply of standard contractual interpretations of issues relating to work time, work rules and work duties can be classified as "minor disputes" as can the host of everyday employee grievances surrounding such contract terms. In such circumstances, the arbitral provisions of the Railway Labor Act work well.

However, as this Court has noted, a collective bargaining agreement cannot eliminate substantive legal rights accorded to employees independent of the collective bargaining agreement. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (rejecting the claim that the RLA preempted a state law prohibiting racial discrimination). Any holding to the contrary would unduly usurp the regulatory powers of the states. Further, such a decision would require arbitrators to decide issues of state or federal anti-discrimination law wholly outside the confines of the collective bargaining agreement.

This Court has held that the strong policy in favor of arbitration under the RLA must yield when an employee's cause of action arises from a

federal statute which provides "minimum substantive guarantees to individual workers." Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 565 (1987) (quoting Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)). In Buell, this Court held that a railroad employee could maintain a negligence action under the Federal Employers' Liability Act, 45 U.S.C. §§51-60, [FELA], even though the claim might have been subject to arbitration under the RLA. 480 U.S. 557 at 564-567. This Court found it "inconceivable" that Congress, which provided substantive protection and a remedy for workers under FELA, intended to limit federal relief to remedies providing for arbitration under the RLA. 480 U.S. 557 at 565.

This Court has also stated that "preemption

should not be lightly inferred" because "the establishment of labor standards falls within the traditional police power of the State" and "does not impermissibly intrude upon the collective-bargaining process." Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21, 23 (1987). Congress must express "a clear intent to preempt state law" when it comes into conflict with federal law. Louisiana Public Services Comm'n v. F.C.C., 476 U.S. 355, 368 (1986). No such "clear intent" is present in the Railway Labor Act.

This Court has also stated that arbitrators exceed their authority if they base their decisions on a source of law outside the collective bargaining agreement. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

Determination of whether or not Petitioner violated Hawaii's state whistleblower act, as is alleged by Respondent Norris, would most certainly require just such an interpretation of a state statute, a source of law outside the collective bargaining agreement. On the other hand, a determination of whether there was such a violation would not require any interpretation of the collective bargaining agreement because neither party can bargain away rights accorded under state law.[2]

In balancing two competing interests, the

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[2] While the "major-minor dichotomy" is certainly helpful in the analysis of collective bargaining issues, as this case readily establishes, it proves a false construct for the resolution of issues wholly outside the contract and the collective bargaining relationship, such as "whistleblower" rights accorded by state statute.

state's power to regulate the establishment of labor standards under its traditional police powers and the federal interest in uniform interpretation of collective bargaining agreements, the former would be wholly nullified if the latter were to prevail in this case. Whistleblowing, an issue unrelated to the collective bargaining agreement, must be adjudicated under the laws of the state as delineated by state decisional law rather than through a collective bargaining arbitral process.

B. Protecting and Enforcing the Rights of "Whistleblowers" Constitutes an Important Public Policy Independent of the Collective Bargaining Contract

At first blush, many employers might characterize the "whistleblower" employee as either "insubordinate" as did the employer

herein or as an uncooperative troublemaker. Nothing could be further from the truth, however, for it is the stubborn courage of such solitary truthseekers which prevents disasters of a public magnitude. Respondent Norris refused to give his imprimatur to repairs performed on an assertedly worn and unsafe aircraft axle sleeve affecting the aircraft's entire landing gear system. He also reported such asserted safety infractions to the Federal Aviation Authority and alleges that his discharge was caused by such whistleblowing activity in contravention of the Hawaii Whistleblowers' Protection Act [HWPA], Hawaii Revised Statutes (HRS) §378-61 through 69 (Supp 1992), and the airline safety policies underlying the Federal Aviation Act.

That states choose to protect such whistleblowers is surely within the confines of their regulatory police and safety powers. States such as Hawaii and New Jersey, for example, are in the vanguard of states seeking to afford such protection to their citizens.[3] To discourage these protections by over-incursion of the pre-emption doctrine risks stifling legitimate reservations, dissents and constructive criticisms which protect both employees and the public from dangers to health and safety. The evisceration of the rights of trained employees to speak out on matters of public policy concern, however unpopular such

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[3] See Maher v. New Jersey Transit Rail Operations, Inc., 125 N.J. 455, 593 A.2d 750 (1991) enforcing New Jersey's whistleblower statute and finding said statute not preempted by the RLA.

position may be with their immediate supervisor, may be a prescription for disaster.[4]

C. Requiring Arbitration Under The Railway Labor Act Restricts Substantive Remedies And Procedural Rights

1. Substantive Remedies

Tort claims have historically provided

[4] Thus, in its investigation of the Space Shuttle Challenger Accident in 1987, the Rogers Commission Report noted that the National Aeronautics and Space Administration (NASA) interfered with "the mission" by stifling the legitimate reservations, dissent and constructive criticisms of the project engineers. See Presidential Commission on the Space Shuttle Challenger Accident, Report to the President (Washington, D.C.: U.S. GPO, 1986) pp. 171-72, 199-201. In fact, as noted in McConnell, Challenger: A Major Malfunction (Garden City, New York: Doubleday, 1987) p. 1987, one NASA engineer testified that he did not express safety concerns because he had previously been "personally chastised" and "crucified" by his supervisors for raising design objections.

substantive remedies not ordinarily available under a collective bargaining agreement, including, in the instant case, the right to compensatory and/or exemplary damages. Norris v. Hawaiian Airlines, Inc., 842 P.2d 634, 647.[5] Depriving employees of damages beyond the traditional "reinstatement and backpay" remedies normally available in the arbitral process deprives employees of remedies for intangible and ancillary compensatory losses such as losses for severe emotional distress, out of pocket expenses and the financial ramifications of a ruined credit rating.

[5] The Hawaii Whistleblower's Protection Act (HWPA), Hawaii Revised Statutes §§378-61 through 69 (Supp. 1992), also ensures that any rights and remedies in a collective bargaining agreement which are in addition to the rights and remedies of the HWPA are not limited by the Act.

Arbitration ignores such substantive remedies. It also relieves the employer of the possibility of monetary liability large enough to deter wrongdoing in the first instance.[6]

2. Procedural Rights

The possibility of increased financial liability and the trial by jury to which employees have a right under most state tort and federal anti-discrimination laws encourage many employer groups, including those filing amicii briefs herein, to advocate for mandatory

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[6] Compensatory and exemplary damages are also available for intentional discrimination under Title VII and Americans with Disabilities Act, which both provide for punitive and compensatory damages in amounts up to $300,000, 42 U.S.C. §1981a(b); and under 42 U.S.C. §1981, which provides for unlimited compensatory and possible exemplary damages for intentional race discrimination. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

arbitration as a way of avoiding both increased liability and jury trials. Should such groups prevail, employees would thus be essentially deprived of the only weapons they wield against the superior economic power of their employer: the deterrent effect of laws enforced in state or federal court which protect their rights.

3. Right of Discovery

Arbitration also radically restricts employees' right to discovery. In the employment setting, most documents are within the control of the employer, and most witnesses work for, and are therefore paid by, the employer. Limited or nonexistent access to discovery of such employer documents or witnesses often precludes the employee from presenting as effective a case in arbitration as

in a trial court and creates a distinct disadvantage for the employee. Mandatory arbitration, with its limits on discovery of company records, statistics, and prior incidents, becomes the means by which employers avoid or limit the effect of laws enacted to protect workers.

4. Right to jury trial

This Court has long noted the importance of preservation of the right to jury trial. Such a right to jury trial, whether created by state or federal statute, is especially critical in the employment case so that the discharged employee can be judged by a jury of his or her peers.

Congress and the various states created these rights and remedies, including the right to a jury trial in whistleblower and anti-

discrimination statutes.[7] Indeed, Congress went through a tumultuous struggle over the right to a jury trial in the Civil Rights Act of 1991 which amended the Civil Rights Act of 1964. Without a clear Congressional intent to the contrary - absent in the RLA - the right to jury trial and the right to a judicial forum to resolve employment disputes outside the confines of the collective bargaining contract should be preserved.

IV. CONCLUSION

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[7] Damages and jury trials in Title VII and Americans with Disability Act cases are provided by 42 U.S.C. §1981a(b) and (c). Liquidated damages and jury trials in Age Discrimination in Employment Cases are provided by 29 U.S.C. §626(b) and (c). Damages and jury trials are also available in cases under 42 U.S.C. §1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454; Lytle v.Household Mfg., Inc., 494 U.S. 545 (1990).

Claims which are unrelated to a collective bargaining agreement and which cannot be adjudicated by interpreting that agreement should not, as a matter of construction or public policy, be preempted by the Railway Labor Act. NELA respectfully seeks affirmance of the decision of the Supreme Court of Hawaii in this case.

Respectfully submitted,

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